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No. 87-532

In the Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS GUGLIELMI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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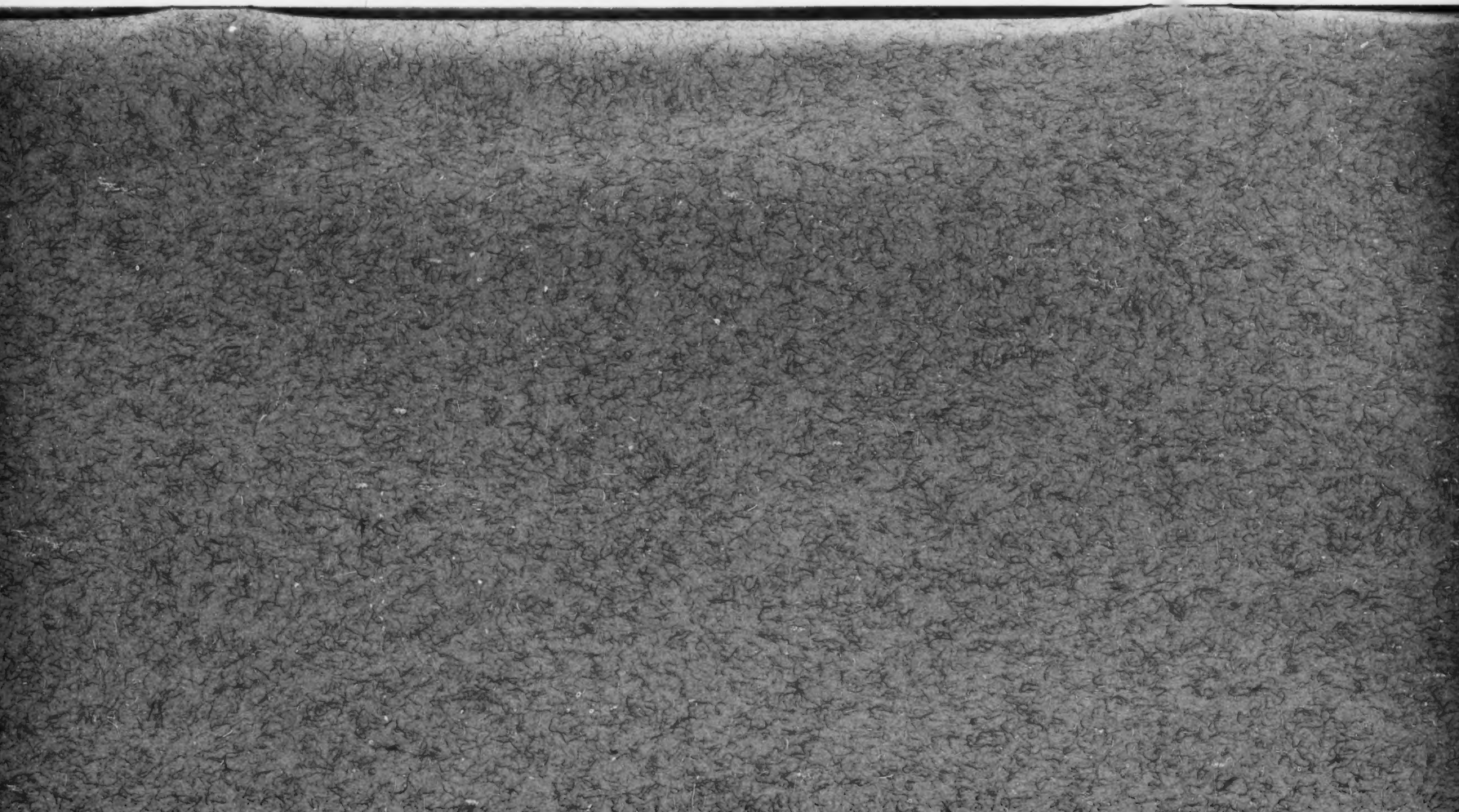

QUESTIONS PRESENTED

1. Whether the court of appeals held that sexually explicit films may be found to be obscene if they have the capacity to evoke curiosity among prospective viewers.

2. Whether petitioner's five consecutive five-year sentences violate the Eighth Amendment because they are disproportionate to the offenses of which he was convicted.

3. Whether petitioner was improperly sentenced to consecutive prison terms for acts that were part of a continuing course of criminal conduct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A24) is reported at 819 F.2d 451.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1987. A petition for rehearing was denied on July 1, 1987 (Pet. App. A25). On August 6, 1987, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 29, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on five counts of interstate transportation of ob-

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scene films, in violation of 18 U.S.C. 1465; five counts of using a common carrier for the interstate transportation of obscene films, in violation of 18 U.S.C. 1462; and conspiracy to ship obscene materials, in violation of 18 U.S.C. 371. The transportation counts were paired with the shipment counts for sentencing, and consecutive five-year terms were imposed on each set of paired counts. In addition, a concurrent five-year term was imposed on the conspiracy count for a total sentence of 25 years' imprisonment. Petitioner was also sentenced to pay fines totaling $35,000 (Pet. App. A4-A5). The court of appeals affirmed.

1. As summarized in the opinion of the court below (Pet. App. A3-A9), the government's evidence at trial showed that, beginning in July 1983, the FBI began to investigate the interstate shipment of obscene materials to the New Freedom Bookstore in Charlotte, North Carolina. After purchasing some films from the store, an FBI agent arrested the proprietor, who informed him that he had obtained the materials from petitioner, who operated a wholesale outlet in Baltimore, Maryland, known as Central Sales, Inc.

The agent then enlisted the former proprietor of another "adult" book store in the Charlotte area to order similar films from petitioner. Petitioner selected several specific titles and made three shipments of films from Baltimore to Charlotte by common carrier in July, August, and September 1984 (C.A. App. 734-738, 779). Also in September 1984, an undercover FBI agent visited the large warehouse in Baltimore operated by Central Sales, and petitioner showed him the room where he kept "animal films." Petitioner advised the agent to "[b]e careful in selling" those films, because "you can get yourself in a lot of trouble with these" (*id.* at 786-788).

The eight films seized from the New Freedom Bookstore or received through interstate shipments from petitioner

depict, among other things, acts of bestiality. Three of the films are described in detail in the opinion of the court below (Pet. App. A5-A9). One, entitled "Snake Fuckers," shows two women engaging in sex acts involving a live eel, which is later fried on a kitchen stove while men and women are depicted performing heterosexual and homosexual sex acts (*id.* at A5-A6). Other films, including the other two described by the court of appeals (*id.* at A7-A8), depict sex acts involving human males and females and a cow, a boar, horses, dogs, chickens, donkeys and a pig (GXs 1-9; see Gov't C.A. Br. 14-17).

2. At trial, petitioner maintained that the "prurient interest" branch of the three-part test of *Miller* v. *California*, 413 U.S. 15, 24 (1973), could be satisfied only if the material appealed to the prurient interests of either the average person or the average zoophiliac. He further argued that the material would not appeal to the average person and that, because there is no such thing as an "average" zoophiliac, he could not be convicted. The trial judge, however, instructed the jury, using a pattern jury instruction,[1] as follows (C.A. App. 1217):

> The first test to be applied, therefore, in determining whether given material is obscene is whether the predominant theme or purpose of the material, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipients, is an appeal to the prurient interest of the average person of the community as a whole, or the prurient interest of members of a deviant sexual group, as the case might be.

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[1] See, *e.g.*, U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions* 110 (1983 ed.); U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions* 143 (1985 ed.).

The jury returned guilty verdicts on the conspiracy count, on all five counts of interstate transportation of obscene films, and on all five counts of the use of a common carrier to ship them. The transportation and use counts were paired with respect to five different shipments. Petitioner had shipped three of the films, which formed the basis for two pairs of counts in the indictment, to the New Freedom Bookstore. He sent the remaining films to the FBI as the result of its undercover operation. The trial judge imposed consecutive five-year terms on each of the five sets of paired counts and a concurrent five-year term on the conspiracy count.

3. On appeal, petitioner claimed that the evidence was insufficient to establish that the films appealed to the prurient interest and that the trial court's instruction concerning prurient interest was incorrect, because the court failed to instruct that the material in question must appeal to the average adult or the average member of a deviant sexual group. Petitioner also claimed that the 25-year aggregate sentence he received constituted cruel and unusual punishment because it was disproportionate to the offenses of which he was convicted.

The court of appeals rejected those claims.[2] After reviewing the contents of the films on which the prosecution was predicated, the court concluded that "there is support for the testimony of the government's expert witness that each of the films would have an appeal to the prurient interest of an otherwise sexually normal person" (Pet. App. A8-A9). In addition, the court noted that the government's expert witness had expressed the opinion that the films would appeal to the prurient interest of zoophiliacs (*id.* at A9).

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[2] The court of appeals also rejected claims that the trial judge abused his discretion in conducting the voir dire examination himself and in failing to ask particular questions, and that he should have recused himself because of personal bias (Pet. App. A18-A22).

The court of appeals noted that erotic material is not obscene unless it "appeals to or provokes a prurient interest" (Pet. App. A15). That is, the material "must appeal to * * * a shameful or morbid interest and also be patently offensive" (*id.* at A15-A16). The fact that the material provokes only curiosity among normal persons is not enough to render it nonobscene, the court noted, if the material appeals to the prurient interest of members of a deviant sexual group (*id.* at A14-A16). Thus, the court held that it was unnecessary for the material to "excite[ ] the sexual drive of the average person" in order for it to be found obscene (*id.* at A16). In this case, the court observed, "[t]he jurors viewed the films, and, with such help as the expert witnesses provided, were competent to make the proper determination" (*id.* at A17).

The court expressed concern about the length of the sentence but held that the sentence was permissible because it was well within statutory limits. The court also read its own prior decision in *United States* v. *Rhodes*, 779 F.2d 1019 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986), to hold that the Eighth Amendment does not require proportionality review of any sentence of less than life imprisonment without parole. Pet. App. A22-A23.

ARGUMENT

1. The First Amendment protects some materials that deal with sex. "[M]aterials that provoke[ ] only normal sexual reactions" and "material that, taken as a whole, does no more than arouse, 'good, old fashioned, healthy' interest in sex" are protected. *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985). It is to distinguish such materials from obscenity that this Court has included a "prurient interest" component in the definition of obscenity. See *Roth* v. *United States*, 354 U.S. 476, 487 & n.20 (1957).

Petitioner does not and cannot maintain that the materials at issue in this case—films showing both bestiality and various sexual acts performed by human beings—would appeal to a normal and healthy rather than a prurient interest in sex. Rather, he maintains that they would appeal to no one (except, perhaps, certain zoophiliacs) and that "materials which are so repulsive that they do not excite, arouse, or stimulate sexually are outside the scope of obscenity regulation" (Pet. 11). Petitioner further contends (Pet. 7-8, 10-11, 12-13 n.2) that the court of appeals improperly extended the reach of the obscenity laws to encompass materials that do not have the capacity to arouse viewers sexually, but merely have the capacity to evoke the curiosity of viewers. He bases that characterization of the court of appeals' opinion on a reference in the opinion to a comment in the 1957 draft of the Model Penal Code, in which the reporter observed that the concept of an appeal to the prurient interest refers "to qualities of the material itself: the capacity to attract individuals eager for a forbidden look" (Model Penal Code § 207.10(2), comment at 10 (Tent. Draft No. 6, 1957), quoted at Pet. App. A14-A15).

Contrary to petitioner's contention, the court of appeals did not hold that materials may be obscene even if they have no capacity to provoke a sexual response in anyone. To the contrary, the court made it clear that, in order to be judged obscene, the materials in question must appeal to a shameful or morbid interest in sex in the average person, or in members of a deviant sexual group (Pet. App. A15-A16). The reference to the 1957 draft of the Model Penal Code did not lead the court, as petitioner suggests (Pet. 10-11), to "reject[ ]" or "distort" tests for obscenity that this Court has developed; rather, the reference was designed simply to explain the underlying rationale of the prurient interest test that this Court has applied ever since *Roth*. In particular, the court of appeals did not suggest

that jury instructions should be phrased in terms of "forbidden look[s]." Instead, the court explained why the standard jury instruction that was given in this case, which was phrased in terms of "an appeal to the prurient interest," was proper and why the evidence in this case was sufficient to convict. The court further explained (Pet. App. A15) that material is obscene "only if it appeals to or provokes a prurient interest," *i.e.*, "whetting of sexual appetite" (*id.* at A16). The court's discussion thus made it clear that an appeal to mere curiosity would not be sufficient.

The district court also did not mislead the jury in its instructions on the "prurient interest" requirement. The district court's instruction on prurient interest (see page 3, *supra*) was almost identical to the instruction that this Court approved in *Pinkus* v. *United States*, 436 U.S. 293, 301-302 (1978). After explaining that the material had to appeal to either the prurient interest of the average person in the community or the prurient interest of members of a deviant sexual group (C.A. App. 1217), the court described a prurient interest as "a morbid, degrading and unhealthy interest in sex," and explained that "[t]he test is whether the group to whom the film is directed would have a prurient interest in it" (C.A. App. 1219). Those instructions informed the jurors that, in order for petitioner to be convicted, the films had to be of a sort that, in the jury's judgment, would appeal to the unwholesome interest in sex of either the average member of the community or members of an identified deviant sex group. The instructions are entirely consistent with this Court's teachings on the issue of prurient appeal, both with regard to materials likely to appeal to the average person in the community and with regard to materials directed at members of deviant sexual groups.

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In *Mishkin* v. *New York*, 383 U.S. 502, 509 (1966), this Court rejected the claim "that the books depicting sexually deviant practices are devoid of prurient appeal" simply because they would not have appealed to the average member of the community. The Court held that where the material "is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group" (*id.* at 508). In *Hamling* v. *United States*, 418 U.S. 87 (1974), the Court addressed the question of how the prurient interest test applies to cases in which the materials could appeal to either the average person or a member of a deviant sexual group. On that issue, the Court held in *Hamling* that the jury could find that the materials satisfied the prurient interest test if some of them appealed to the prurient interest of deviant groups and other portions appealed to the prurient interest of the average person (*id.* at 128).

That was precisely the case here. Six of the eight films at issue in this case contained depictions of human beings engaged in sexual activities with one another as well as with animals (GXs 1-6, 9). The other two films featured sexual activity between humans and animals—principally intercourse between women and farm animals (GXs 7, 8). The government's expert testified at trial that some of the material in the films would appeal to the prurient interest of the average person and other portions of the materials would appeal to the prurient interest of zoophiliacs (C.A. App. 891-893). That evidence gave the jury a sufficient basis on which to find that the films were obscene.

Petitioner argued in the court of appeals that the district court erred by failing to instruct the jury that in order to be obscene, the films had to appeal to the "average"

zoophiliac. In both the district court and the court of appeals, however, petitioner made the entirely inconsistent argument that there was no such thing as an "average" zoophiliac, but that zoophiliacs are all "animal-specific" in their tastes. See Pet. App. A2, A11. Rather than requiring the jury to engage in a pointless inquiry as to whether there is an "average" zoophiliac or only discrete subgroups of zoophiliacs, each with their own "animal-specific" fetishes, the district court properly resolved the problem by requiring the jurors to find that the materials appealed to the average adult member of the adult community as a whole or to members of some deviant sexual group; the court left it to the jury to determine whether the materials in this case would have prurient appeal either to zoophiliacs as a whole or to specific subgroups among the general group of zoophiliacs. In either event, the materials would satisfy the "prurient interest" test; it is no defense that the deviant group or subgroup at which the materials are directed is small.

2. Petitioner also claims (Pet. 14-25) that he received a sentence so severe that it violates the Eighth Amendment as construed in *Solem* v. *Helm*, 463 U.S. 277 (1983). The decision in *Helm*, however, does not require that petitioner's sentence be overturned, and the judgment of the court of appeals rejecting petitioner's Eighth Amendment argument is correct and does not conflict with the decision of any court of appeals.

In *Helm*, the Court held that the Eighth Amendment requires that a "criminal sentence must be proportionate to the crime for which the defendant has been convicted" (463 U.S. at 290). The Court listed three factors that reviewing courts should use for guidance when considering the proportionality of a sentence: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the same crime in other

jurisdictions (*id.* at 292). Applying this analytical framework to the case before it, which involved a sentence of life imprisonment without possibility of parole under a state recidivist statute for uttering a $100 worthless check, the Court concluded that the sentence was disproportionately harsh and, therefore, violated the Eighth Amendment (*id.* at 295-303).

The *Helm* Court made it clear that it would not require an extended proportionality review in cases involving less severe sentences. It explained that, as a general principle, it is not the function of an appellate court to substitute its judgment for that of a sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment, the appellate court decides only whether the sentence is within constitutional limits. Therefore, "[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." 463 U.S. at 290 n.16. Likewise, the Court was careful to distinguish—not to overrule—*Rummel* v. *Estelle*, 445 U.S. 263 (1980), which upheld a life sentence for the third of three nonviolent property crimes involving $229.11 altogether. See 463 U.S. at 288 n.13, 297, 300-303 & n.32.[3]

Relying on the express disclaimer in *Helm*, 463 U.S. at 290 n.16, and the distinction this Court drew between the facts in *Helm* and those in *Rummel*, the court of appeals in a previous decision had held that *Helm* "requires an extensive proportionality analysis only in those cases involving life sentences without parole." *United States* v.

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[3] Among other things, the *Helm* Court noted that "Rummel was eligible for a reasonably early parole" (463 U.S. at 304 n.32)—*i.e.*, 12 years (*id.* at 297, 300-301). Petitioner concedes that he is eligible for parole even earlier—*i.e.*, in eight years (Pet. 21 n.6; see 18 U.S.C. 4205(a)).

Rhodes, 779 F.2d 1019, 1027-1028 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986).[4] The *Rhodes* approach is similar to that taken by several other courts of appeals that have concluded that "[i]n cases factually similar to *Rummel*, *Rummel* still provides the rule, and a proportionality challenge to a particular sentence may be rejected without application of the *Solem* [v. *Helm*] objective criteria test." *Chandler* v. *Jones*, 813 F.2d 773, 778-779 (6th Cir. 1987) (life sentence with parole eligibility after 30 years not violative of Eighth Amendment); see *United States* v. *Rosenberg*, 806 F.2d 1169, 1175 (3d Cir. 1986) (expressing agreement with Fourth Circuit that in cases not involving life sentence without parole, an abbreviated proportionality review is appropriate), cert. denied, No. 86-6449

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[4] The government cited this passage in its brief in the court of appeals (at 40) and proceeded to argue that the sentence imposed was sufficiently proportionate to the offenses to satisfy the Eighth Amendment. The government did not argue that *Rhodes* or any other decision allowed the sentence to be upheld without any proportionality review at all. Petitioner's reply brief in the court of appeals (at 15), however, inaccurately characterized the government's argument as being "that, under this Court's decision in *United States v. Rhodes*, * * * any prison sentence short of a life sentence without parole is automatically consistent with the Constitution and not subject to attack under the Eighth Amendment." Although any such government argument would have been a misreading of *Rhodes* (in which the court did conduct Eighth Amendment proportionality review of 50- and 75-year terms of imprisonment), petitioner did not point that fact out; indeed, his brief made no other mention of *Rhodes*. Unfortunately, the court of appeals accepted petitioner's inaccurate characterization of *Rhodes* and considered itself bound to uphold the sentence in this case without any proportionality review, extensive or otherwise (Pet. App. A23). We agree with petitioner that the court of appeals erred by failing to conduct any proportionality review. There is no need for this Court to correct that error, however, because petitioner's sentence is in fact sufficiently proportionate to his offenses to satisfy the Eighth Amendment.

(May 26, 1987); *Holley* v. *Smith*, 792 F.2d 1046, 1049 (11th Cir. 1986) (*Helm* not to be construed as holding that extensive review of all prison sentences is constitutionally required), cert. denied, No. 86-6408 (Apr. 20, 1987); *Moreno* v. *Estelle*, 717 F.2d 171, 179-180 (5th Cir. 1983) (*Rummel* and not *Helm* governs sentences involving less than life terms without parole), cert. denied, 466 U.S. 975 (1984); see also *United States* v. *Sato*, 814 F.2d 449, 453-454 (7th Cir. 1987).

No extended proportionality analysis is required in this case because petitioner's sentence easily passes constitutional muster. First, petitioner's 25-year sentence, with a possibility of parole in eight years, is less harsh than the sentences upheld in *Rummel* v. *Estelle, supra*, and *Hutto* v. *Davis*, 454 U.S. 370 (1982), even though petitioner's crimes were at least as serious as the crimes involved in those cases.[5] It is difficult to construct an argument that would recognize the constitutionality of the punishments in *Rummel* and *Davis* but strike down the punishment in this case; petitioner has never tried to construct such an argument.[6]

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[5] *Rummel* involved a life sentence, with parole eligibility in 12 years (445 U.S. at 280-281), for the crime of obtaining $120.75 by false pretenses (a crime preceded by two other property crimes that netted the defendant a total of $108.36). *Davis* involved a 40-year sentence for two counts arising out of a single nine-ounce marijuana transaction. It seems obvious that the crimes involved in this case are more serious than the ones involved in *Rummel*. As to *Davis*, reasonable persons could differ about whether a single marijuana transaction more seriously offends society than the operation of a wholesale outlet for obscene materials, but the latter plainly is not so much less serious than the former as to require different constitutional results in *Davis* and in this case. Cf. *Rummel*, 445 U.S. at 282-283 n.27.

[6] In his petition (at 16 n.3), as in his reply brief in the court of appeals (at 16), petitioner has limited his discussion of *Rummel* to the assertion that it does not "foreclose proportionality review of sentences of imprisonment"—a point we readily concede. Petitioner

Likewise, petitioner's sentence and crimes are at least roughly comparable in their severity and seriousness to those in other cases in which the courts of appeals have rejected Eighth Amendment challenges.[7] Indeed, petitioner does not claim that any court of appeals has found an Eighth Amendment violation in the imposition of a 25-year or comparable sentence for crimes that are in any way similar to his.

Moreover, the five-year maximum sentence under 18 U.S.C. 1462 and 1465, which petitioner received on each of five counts, is equal to or less than the maximum sentence for a single count of similar conduct in at least nine States (Oklahoma, Pennsylvania, Arkansas, Florida, Massachusetts, Missouri, North Dakota, Washington,

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has never attempted to show that this case involves greater disproportionality than did *Rummel*.

[7] See, *e.g.*, *United States* v. *Fermin Castillo*, 829 F.2d 1194, 1200 (1st Cir. 1987) (nothing in the Constitution forbids the imposition of six consecutive five-year sentences for six uses of the wires in the course of a single wire fraud scheme; defendant's actual 12-year sentence did not violate Eighth Amendment and was "not * * * even particularly severe"); *Tuitt* v. *Fair*, 822 F.2d 166, 180-181 (1st Cir. 1987) (life imprisonment under recidivist statute for armed robbery), cert. denied, No. 87-5474 (Nov. 9, 1987); *United States* v. *Eggleton*, 799 F.2d 378, 384 (8th Cir. 1986) (45-year sentence for armed bank robbery); *Foots* v. *Louisiana*, 793 F.2d 610 (5th Cir. 1986) (10-year term for purse snatching); *United States* v. *Terrovona*, 785 F.2d 767, 771 (9th Cir.) (one year's imprisonment for making false statement), cert. denied, 476 U.S. 1186 (1986); *United States* v. *Hack*, 782 F.2d 862, 869 (10th Cir.) (55-year term for attempted skyjacking and conspiracy), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Rhodes*, *supra* (50- and 75-year sentences without parole for operating a continuing criminal enterprise); *United States* v. *Bonnet*, 769 F.2d 68, 71 (2d Cir. 1985) (minor sentenced to two consecutive five-year terms for auto theft); *United States* v. *Ortiz*, 742 F.2d 712 (2d Cir.) (10-year term with parole eligibility after five years for drug distribution), cert. denied, 469 U.S. 1075 (1984).

and Wisconsin).[8] Congress's judgment about the severity with which obscenity should be handled, although it may be a harsher judgment than that reached by many state legislatures, is hardly unique. By contrast, in *Helm*—the only case in which this Court has ever struck down a term of imprisonment on Eighth Amendment grounds—"[i]t appear[ed] that Helm was treated more severely than he would have been in *any* other State" (*Solem* v. *Helm*, 463 U.S. at 300 (emphasis added)).

To be sure, petitioner received not one maximum sentence but five consecutive maximum sentences (as presumably would have been permitted if he had engaged in similar conduct in the States and had been charged under their law), for a total sentence of not five but 25 years. But petitioner was guilty of more than one crime; in fact, he was convicted of 11 separate offenses, for which

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[8] Okla. Stat. Ann. tit. 21, § 1021 (West Cum. Supp. 1987) (ten-year maximum for sale of obscene matter); Pa. Stat. Ann. tit. 18, § 5903(a)(2) and (h)(1) (Purdon 1983) (sale of obscene materials for the purpose of resale is a felony of the third degree); *id.* § 1103(3) (seven-year maximum for felony of the third degree); Ark. Stat. Ann. § 41-3585.2(2) (Cum. Supp. 1985) (promoting obscene materials is a class D felony); *id.* § 41-901(1)(e) (six-year maximum for class D felony); Fla. Stat. Ann. § 847.07 (West Cum. Supp. 1987) (wholesale promotion of obscene materials is a felony in the third degree); *id.* § 775.082(3)(d) (West 1976) (five-year maximum for felony in the third degree); Mass. Ann. Laws ch. 272, § 29 (Law. Co-op. Supp. 1987) (five-year maximum for sale of obscene materials); Mo. Ann. Stat. § 573.020(2) (Vernon 1979) (promoting pornography in the first degree is a class D felony); *id.* § 558.011(4) (Vernon Cum. Supp. 1987) (five-year maximum for class D felony); N.D. Cent. Code § 12.1-27.1-01(1) (1985) (sale of obscene material is a class C felony); *id.* § 12.1-32-01(4) (five-year maximum for class C felony); Wash. Rev. Code Ann. § 9.68.140 (Cum. Supp. 1987) (promoting pornography is a class C felony); *id.* § 9A.20.021(1)(c) (five-year maximum for class C felony); Wis. Stat. Ann. § 944.21(1)(a) (West 1982) (sale of obscenity is a class D felony); *id.* § 939.50 (3)(d) (five-year maximum for class D felony).

he could have been sentenced to a total of 55 years' imprisonment. In any event, as we have noted, even considered in the aggregate, petitioner's 25-year sentence is less severe than sentences that have been upheld by this Court and by the courts of appeals.

Furthermore, any Eighth Amendment issues presented by this case are of little or no continuing importance, at least as regards sentences imposed by federal courts. On November 1, 1987, the Sentencing Reform Act of 1984 went into effect. See 18 U.S.C. (Supp. IV) 3551 *et seq.*; 28 U.S.C. (Supp. III) 991-998. That statute requires trial judges to impose sentences within the range established by guidelines promulgated by the United States Sentencing Commission. See 18 U.S.C. (Supp. IV) 3553; 28 U.S.C. (Supp. III) 994(a)(1). In turn, the statute providing guidance to the Sentencing Commission in establishing sentencing guidelines states that the Commission should "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. (Supp. III) 991(b)(1)(B). Accordingly, after November 1, 1987, application of the Commission's guidelines by trial judges in imposing sentence should virtually if not entirely eliminate the incidence of sentences in the federal system that are even arguably subject to attack as being disproportionate.

3. Finally, petitioner claims (Pet. 26-30) that it was improper for the trial judge to impose consecutive sentences for the three pairs of counts involving the shipment and transportation of obscene materials to the FBI.

As explained in *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981), the question whether a court may impose multiple punishments following conviction on related criminal charges is resolved by reference to what punishments the legislative branch has authorized. See

also *United States* v. *Woodward*, 469 U.S. 105, 108 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 366-369 (1983). In the context of a repetitive series of criminal acts in furtherance of an ongoing scheme, the inquiry focuses on determining what Congress intended as the unit of prosecution. See, *e.g.*, *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 221 (1952); *United States* v. *Fermin Castillo*, 829 F.2d 1194, 1199-1200 (1st Cir. 1987); *United States* v. *Villano*, 529 F.2d 1046, 1061 (10th Cir.), cert. denied, 426 U.S. 953 (1976); *United States* v. *Polizzi*, 500 F.2d 856, 897 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

In this regard, the gravamen of a violation of 18 U.S.C. 1465 is the "knowing[ ] transport[ation] in interstate or foreign commerce for the purpose of sale or distribution [of] *any obscene* * * * *film*" (emphasis added). Section 1462(a), for its part, prohibits the "knowing[ ] use[ ] [of] any express company or other common carrier * * * for carriage in interstate * * * commerce [of] * * * *any obscene* * * * *motion-picture film*" (emphasis added). Nothing in either statute suggests that Congress intended to make the unit of prosecution or punishment a course of conduct involving the repetitive shipment of such merchandise, rather than creating a punishable offense each time a participant in such a scheme knowingly uses a common carrier to transport for resale any obscene film. Indeed, the courts have repeatedly construed similar statutes making it a crime to use interstate transportation or communications facilities in aid of illicit activities to permit prosecution and punishment of each use as a separate offense. See *United States* v. *Fermin Castillo*, 829 F.2d at 1199-1200; *United States* v. *Brown*, 770 F.2d 768, 773 (9th Cir.), cert. denied, 474 U.S. 1036 (1985); *United States* v. *Villano*, 529 F.2d at 1061-1062; *United States* v. *Polizzi*, 500 F.2d at 897-898; see also *United States* v. *Dawson*, 790 F.2d 1565, 1568 & n.3 (11th Cir. 1986) (mail theft); *United*

States v. *Dennison*, 730 F.2d 1086, 1089 (7th Cir.) (stolen credit cards), cert. denied, 469 U.S. 916 (1984). There is no reason why this established doctrine should apply any differently in the context of the obscenity laws.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Petitioner's additional brief suggestion (Pet. 29) that this case involves "governmental overreaching" of the sort that might violate due process and bar conviction altogether (see *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973)) was not raised below and is meritless. The FBI's conduct—placing three orders with a ready and willing supplier of contraband who had already shipped similar materials to the same area at the request of private parties—is hardly government conduct so shocking that a civilized society cannot tolerate it.

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